Supreme Court, U.S.
FILED
OCT 4 1996
CLERK

(6)

No. 96-238

In the
Supreme Court of the United States
October Term, 1996

RICHARD K. EHRLICH, as trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,
Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARDIES, AND PAUL A. JACOBS
Respondents.

Petition for Writ of Certiorari
to the California Supreme Court

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This reply will address the procedural issues raised by the City of Culver City's Brief in Opposition to Richard Ehrlich's Petition for Certiorari. The City's arguments on the merits are more than adequately addressed in Ehrlich's petition as well as those of amici.[1] Petitioner will also in this reply brief direct this Court's attention to a law review article that was unavailable at the time that the opening brief was filed.

I

PROCEDURALLY, THIS CASE IS READY FOR REVIEW

Respondents, Culver City *et al.*, cannot deny the regulatory implications of the California Supreme Court's holding below that a landowner may be forced to pay an indulgence when an existing restriction on the use of land is altered. Respondents do not deny that the fees in this case are being imposed not because of any impact caused by any actual development of the property but because the change in land use restrictions will preclude certain uses in the future

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[1] Except it must be pointed out that the City's curious contention on Pages 22 to 23 that large exactions can be more readily imposed on businesses that are unique as compared to those that are more pedestrian is reason enough for granting the writ of certiorari. Such logic would give new meaning to this Court's explanation of the Fifth Amendment in *Armstrong v. United States*, 364 U.S. 40, 49 (1960): "The Fifth Amendment's guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Culver City would modify the words "some people" with "some people, except for those with unique businesses enterprises."

that might be beneficial to the community. Respondents' Brief in Opposition attempts to divert this Court's attention away from the profound implications of the decision below by focusing instead on charges that new arguments are being raised for the first time in Ehrlich's petition or that the decision below is not sufficiently final. While this Court has, of course, been reluctant to grant certiorari in cases that lack finality, this case *is* final and all claims raised in the petition for certiorari *were* raised below.

A. That the Arts in Public Places Fee Constitutes a Taking Through a Physical Invasion Was Raised Below

In exchange for the change in the land use designation that permitted the construction of condominiums, Culver City required Richard Ehrlich to either pay $33,200 to the City so that it could buy public art or to place $33,200 worth of public art on his property.[2] In his petition for writ of certiorari, Ehrlich claims that forcing him to either pay for public art or have art placed upon his property is an unconstitutional physical taking without the payment of just compensation. Ehrlich's Petition at 28-30. Culver City

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[2] Culver City objects to the use of the adjective "public" for the art placed on Ehrlich's property because, presumably, he still owns it. However, California law states: "'Public facilities' includes public improvements, public services, and community amenities." Government Code § 66000(d). Furthermore, Ehrlich and his successors in interest (the condominium homeowners' association if they were to take title) does not exactly "own" the art in the traditional sense because federal law prohibits the conversion of art into other uses such as, for example, scrap metal, without the permission of the artist. *See* Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a)(3).

argues that this argument was never raised before. Culver City's Opposition at 15-17. However, it has been made clear from the beginning in this case that Ehrlich alleged that the public art fee in this case was a taking. For example, Ehrlich's Verified First Amended and Supplemental Petition for Writ of Mandate and Complaint for Declaratory Relief filed on November 21, 1988, states at Page 19, Page 80, that the "CITY'S actions have resulted in a taking of Ehrlich's property in violation of ... the Fifth and Fourteenth Amendments." Paragraph 76 on Page 17 defines the "CITY'S actions to include the arts fee exaction."

This Court made plain in *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992), that:

> Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are rather separate arguments in support of a single claim--that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

More to the point, however, Ehrlich ***did*** demonstrate in the state court proceedings that the arts fee was a physical invasion. In Ehrlich's supplemental letter brief to the California Court of Appeal filed August 31, 1994, Ehrlich stated: "If the art cannot be placed in eyesight of the public, the property owner must permit entry onto the property for viewing by the public at large." Letter brief at 8. In Ehrlich's Opening Brief to the California Supreme Court, filed May 17, 1995, Ehrlich wrote, "the City's ordinance requires that Petitioner acquiesce in the ***permanent physical occupation*** of property in the form of public art and *access*

by the public to view the art. ... Such ***physical occupation*** constitutes a per se regulatory taking." Opening Brief at 32 (italicized emphasis in original, italicized and bolded emphasis added, citation to record omitted).

The City of Culver City has surely read these briefs. Its claim that physical occupation arguments are being presented for the first time in Ehrlich's Petition for Review is utterly without merit. Furthermore, as the arts fee issue was ***not*** remanded to the city for further review, it is undeniably final and ready for immediate review.

B. The Issues Presented to This Court for Review Have Been Decided with Finality

As noted in Ehrlich's petition for certiorari's discussion of jurisdiction at Page 2, Footnote 1, the importance of this case rests not on the ***amount*** of the public recreation fee, but on the fact that ***any*** fee could be imposed at all for the purpose of ameliorating the "loss" to the public of the "opportunity" to play tennis on Ehrlich's allegedly "private" property. Culver City, however, devotes over seven pages to an argument that because the calculation of the amount of the fee remains undecided, this Court lacks jurisdiction. Culver City's opposition at 8-15.

The California Supreme Court, however, has decided conclusively and without equivocation that fees may be imposed on property owners when a land use restriction is altered. Such fees are solely for the purpose of using a landowner's money to help finance public facilities that would allow the public to enjoy the same sort of activities that the landowner ***might*** have ***voluntarily*** provided under the previous land use restriction. *Ehrlich v. City of Culver City,* Opinion of the California Supreme Court, reproduced in

Petitioner's Appendix A at A-34. ***Nothing on the remand of this case can change this holding one iota.***

Landowners throughout California are stuck with this holding. Ehrlich is stuck with this holding. That the ultimate amount of the fee might be more or less than the original $280,000 does not alter the essential loss of a property interest held by Ehrlich and other private landowners in California.

This case is final for purposes of this Court's review. This Court has recognized that state court decisions can be final for purposes of review even when further proceedings are available below. For example, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.1 (1971), this Court found finality after a ***temporary*** injunction had been issued, noting: "Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing." Similarly, the existence of liability in Ehrlich's case will not be altered by further hearing.

This case is also analogous to *Brady v. State of Maryland*, 383 U.S. 83, 84 n.1 (1963), where this Court found a case final where a determination of guilt, but not punishment had been made by the state court. Here of course the analogy to guilt is the existence of liability for owning property that experiences a change in a land use restriction. Only the punishment, or the amount of the fee, remains to be determined by the City.

Culver City argues that *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), should be read as providing for finality in these circumstances under only the narrowest of circumstances and if a mechanical application of one of four exceptions applies. *See* Culver

City's Opposition Brief at 8. Commentators, however, consider this case to be a "major restatement of practical finality doctrine." Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, § 4010 at 586 (1977). In *Cox Broadcasting*, this Court eschewed applying finality in a "mechanical fashion." 420 U.S. at 477, preferring "'a more liberal, and, as we think, a more reasonable construction,'" *Id.* at 480 (citing *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848)). In *Cox Broadcasting* this Court found that it often

> has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice."

420 U.S. at 477-78 (footnote and citation omitted).

The present case easily falls within the ambit of all four *Cox Broadcasting's* exceptions. "In the first category are those cases in which there are further proceedings--even entire trials--yet to occur in the state courts but where for one reason or another the federal issue is conclusive." *Id.* at 479. Culver City claims that because the amount of the exaction has not yet been determined the federal question has not been conclusively decided. Opposition brief at 9. Culver City is wrong. The California Supreme Court determined that the Takings Clause of the United States Constitution does not preclude imposition of a recreation fee or the arts fee. Petitioner's Appendix at A-34, A-42, A-45-

46. The federal question has been decided. This is conclusive. *See also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306 (1989) (finality of rulemaking found even in face of remand on *amount* of rates).

Citing *Brady*, *supra*, this Court explained that a second exception is found "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." Culver City argues that because the amount of the fee is uncertain, and that because perhaps no fee would be imposed the federal issue may not survive.[3] Opposition brief at 8. However, no matter what sort of fee Culver City finally decides to impose, Ehrlich and other property owners in California will have suffered a taking of their property by virtue of the California Court's determination that land use restrictions placed upon property create some sort of public easement that can be altered only if the landowner is willing to pay a price. In *Cox Broadcasting*, citing to *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), this Court explained that "[n]othing that could happen in the course of the accounting, short of settlement of the case, would foreclose or make unnecessary decision on the federal question." 420 U.S. at 480. The "accounting" of the amount of the fee in the present case is irrelevant to the issue of ultimate liability. The unlikely event of settlement here, as in *Radio Station WOW* is not enough to erase finality.

The third exception is for cases where the federal question could not be reviewed after further state proceedings. 420 U.S. at 481. Upon remand the City of Culver City can impose some sort of fee. The calculation of

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[3] The imposition of "no fee"is probably the only settlement Ehrlich would accept--assuming Ehrlich's attorneys' fees were paid.

the amount of that fee may be challenged. ***But the imposition of liability will not be appealable***. That issue will be res judicata. The California Supreme Court has decided the matter and no further proceedings will alter that result. Under the Rules of this Court, no appeal of the California Supreme Court's decision will be possible after this point in time. Supreme Court Rule 13.1 (Petition for Certiorari must be filed within 90 days of final state court decision). Any purported challenge to the California Supreme Court's in the years ahead will be untimely and unreviewable. *See also Pennsylvania v. Richie*, 480 U.S. 39 (1987) (federal question finally decided and later review of the federal question would be, at least for the most part, impossible).

The fourth exception in *Cox Broadcasting* involves cases where Court reversal of a state court decision could preclude any further litigation and refusal of immediate review "might seriously erode federal policy." 420 U.S. at 482. A decision by this Court in favor of Ehrlich would serve both of these ends. If this Court were to find that the imposition of a land use restriction does not create a virtual zoning easement owned by the public such that a landowner must pay to have it altered, then the recreation fee could not be sustained under any circumstance present in this case. In that case further state court litigation would be precluded. Furthermore, the policy embodied in the Fifth and Fourteenth Amendments proscribing takings without the payment of just compensation would be seriously eroded if this case is not brought to a timely close. There are limits to the Ehrlich's resources and ability to carry on this protracted litigation. The state court opinion below will stand as binding precedent for the State of California no matter what happens on remand. Federal policy as embodied in the Constitution would not be well served if this case is not taken for appeal ***now***. Under all the factors of *Cox Broadcasting* this case is final and ready for review.

II

A NEW LAW REVIEW ARTICLE DEMONSTRATES THE ABERRATIONAL NATURE OF THE DECISION

Counsel for Ehrlich has just been made aware of a new law review article on the subject of the *Ehrlich* opinion. *See* Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 REAL ESTATE L. J. 214 (In Press 1997) (available upon request). The article characterizes the decision with the statement that "if ever a fragmented court rendered a revolutionary, yet muddled decision, this was it." *Id* at 217. It concludes: "Chief Justice Rehnquist's *Dolan* admonition notwithstanding, property rights remain very much a constitutional 'poor relation' in California." *Id* at 243.

CONCLUSION

For the above reasons, as well as those in Ehrlich's petition and amici briefs in support, this Court should grant Richard Ehrlich's petition for writ of certiorari.

DATED: October, 1996.

Respectfully submitted,

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